Filed 5/21/07 In re Eduardo G. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re EDUARDO G., a Person Coming Under the Juvenile Court Law.	B194365 (Los Angeles County Super. Ct. No. FJ39357)
THE PEOPLE, Plaintiff and Respondent, v. EDUARDO G., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Cynthia Loo, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon and Sharlene A Honnaka, Deputy Attorneys General, for Plaintiff and Respondent.

Eduardo G. appeals from an order of wardship (Wel & Inst. Code, §602) after the juvenile court sustained a petition alleging he was in possession of a burglary tool in violation of Penal Code section 466, a misdemeanor. Eduardo G. contends the evidence is insufficient to support the finding of intent.[1] We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Jurisdiction Hearing

Evidence introduced at the jurisdiction hearing established that Eduardo G., then 13 years old, lived at home with his mother and sister. On August 18, 2006, Eduardo G.'s mother found a shaved key in his clothing and gave it to police who came to the home in response to a report that Eduardo G.'s sister was a runaway.

Officer James Miller recognized the key as a white metal Ford key commonly used to steal cars. Because the key had been shaved smooth on both sides, it could be inserted into the ignition of any car, but especially Hondas and Toyotas manufactured in the late-1980s.

In a post-arrest statement in response to questions about his ability to appreciate the wrongfulness of his conduct (*In re Gladys R.* (1970) 1 Cal.3d 855), Eduardo G. said he knew it was wrong to possess a shaved key. Eduardo G. also gave "behaving good" as an example of "something right to do," and "taking G. rides" (meaning stealing cars, according to Officer Miller) as an example of "something bad to do." Eduardo G. told Miller and his partner officer that going to jail was a consequence of doing something wrong.

Eduardo G. neither testified at the hearing nor presented any other evidence on his behalf.

The juvenile court sustained the allegation in the wardship petition, rejecting Eduardo G.'s argument that the evidence failed to establish he possessed the shaved key with the requisite intent to break or enter into a vehicle.

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[1] In light of our decision, we need not address Eduardo G.'s second contention that one of his probation conditions is unconstitutional.

Disposition Hearing

Eduardo G. was declared a ward of the juvenile court and ordered into a residential treatment program for substance abuse, with a maximum confinement period of six months.

DISCUSSION

1. *Standard of Review*

The same standard of appellate review is applicable in considering the sufficiency of the evidence in a juvenile proceeding as in reviewing the sufficiency of the evidence to support a criminal conviction. (*In re Cheri T.* (1999) 70 Cal.App.4th 1400, 1404; *In re Jose R.* (1982) 137 Cal.App.3d 269, 275.) In either case we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) That standard is the same in cases where the People rely primarily on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

2. *Insufficient Evidence of the Requisite Intent*

Possession of a burglary tool in violation of Penal Code section 466[2] is a specific intent offense because it requires the mental state to commit the future act of breaking or entering into a building or vehicle. (See generally *People v. Davis* (1995) 10 Cal.4th 463, 518-519, fn. 15; see also *People v. Harris* (2000) 83 Cal.App.4th 371, 374.) "Thus the elements of the crime described [in Penal Code section 466] are possession and intent." (*People v. Valenzuela* (2001) 92 Cal.App.4th 768, 777.) The prosecution must prove the

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[2] Penal Code section 466 provides: "Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vice grip pliers, water-pump tubular lock pick, floor--safe door puller, master key, ceramic and porcelain spark plug chips and pieces, and other instrument or tool with intent feloniously to break or enter into any building, . . . or vehicle as defined in Vehicle Code . . . is guilty of a misdemeanor."

object was intended to be possessed as a burglary tool rather than for an innocent reason. The only way to meet this burden is with evidence the possessor had the intent to use the object for an unlawful rather than harmless purpose. (See *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404.) "Intent, however, can be inferred from circumstantial evidence. (§ 21, subd. (a).) Indeed, it is recognized that 'the element of intent is rarely susceptible of direct proof and must usually be inferred from all the facts and circumstances disclosed by the evidence.' [Citations.]" (*People v. Falck* (1997) 52 Cal.App.4th 287, 299; see also *People v. Martin* (2001) 25 Cal.4th 1180, 1184; *People v. Lewis* (2001) 25 Cal.4th 610, 653.)

Eduardo G. argues that in the absence of proof he possessed the shaved key with the specific felonious intent "to break or enter into" either a building or a vehicle, the evidence is insufficient he violated Penal Code section 466. The People respond that there is ample evidence of Eduardo G.'s felonious intent. They point to his post-arrest statements that he knew the wrongfulness of possessing a shaved key and taking G. rides as corroborating evidence of his specific intent, primarily because, according to the People, there was no rational reason for Eduardo G. to have a burglary tool, other than to commit a burglary or car theft.

In *Cook v. Superior Court* (1970) 4 Cal.App.3d 822, the defendants were indicted under Penal Code section 466 for possession of a device commonly used by professional burglars to disassemble locks while staying in a hotel where burglaries had occurred. (*Id.* at p. 825.) In issuing a peremptory writ on a motion to set aside the indictment, the appellate court noted that the prosecution failed to present admissible evidence to the grand jury indicating that the defendants feloniously intended to break or enter into a building. (*Id.* at p. 829.) No admissible evidence led to the conclusion that the device had been used in a burglary, that defendants possessed stolen property, or that the defendants were in any way involved in the burglaries reported to the police. (*Ibid*.) Lacking admissible evidence of intent, the appellate court instructed the trial court to set aside the indictment under Penal Code section 995. (*Ibid.*)

As in *Cook, supra*, the prosecution here failed to present any evidence indicating Eduardo G. either was going to be or had been involved in committing any type of burglary or car theft, or that he possessed stolen property. Instead the evidence before the juvenile court was that he possessed the shaved key and knew of its potential use as a burglary tool. But knowing possession of a burglary tool is not a crime until the tool is intended to be used feloniously. (*People v. Valenzuela, supra*, 92 Cal.App.4th at pp. 776-779.) It is true Eduardo G.'s knowledge of the prohibited nature of the shaved key could raise a strong suspicion that he intended to use it to commit a burglary or car theft. However, "[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Viewing the record in its entirety, there is no substantial evidence from which the juvenile court could reasonably find Eduardo G. intended to use the shaved key in a felonious manner.

DISPOSITION

The order under review is reversed.

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ZELON, J.

We concur:

JOHNSON, Acting P. J.

WOODS, J.